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Malayan Banking Bhd v Gan Bee San & Ors and another appeal (SKS Foam (M) Sdn Bhd, intervener)

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-99–09 OF 2017(B) AND 02(i)-101–09 OF 2017(B)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), ZAINUN ALI, ZAHARAH IBRAHIM, ALIZATUL KHAIR AND ROHANA YUSUF FCJJ
C 22 NOVEMBER 2018

Companies and Corporations — Winding up — Winding up order — Deputy registrar made winding up order against company in chambers in breach of r 5(1)(a) of the Companies (Winding-Up) Rules 1972 — Whether order a nullity and incurable — Whether r 5(1)(a) not a mere rule of practice or a technicality but went to fundamental question of jurisdiction — Whether only judge in open court had jurisdiction to make a winding up order — Whether High Court had inherent jurisdiction to set aside fundamentally irregular/seriously defective winding up order even if order had been perfected

The instant appeals emanated from a decision of the Deputy Registrar of the High Court to order the winding up of a company ('SKS Foam') on the petition of Malayan Banking Bhd ('MBB'). About three years after the order was made, the first three respondents herein ('the respondents'), claiming to be contributories and/or creditors of SKS Foam, applied to intervene and set aside the winding up order on the ground it was a nullity for breach of r 5(1)(a) of the Companies (Winding-Up) Rules 1972 which provided that only a judge in open court could make such an order. The High Court dismissed the setting-aside application but allowed MBB to amend the winding up order to show that it was made by a judge instead of the deputy registrar. The Court of Appeal ('COA') allowed the respondents' appeal and set aside both the winding up order and the order amending it holding that they were both nullities. The leave question to the Federal Court in the instant appeal against the COA's decision was whether the High Court had jurisdiction to set aside a winding up order which had been perfected, even if it was obtained in breach of r 5 of the Companies (Winding-Up Rules) 1972.

Held, dismissing the appeals, affirming the COA's decision, answering the leave question in the affirmative and ordering the winding up petition to be heard before a High Court judge in open court:

(1) The words 'the judge in open court' in r 5(1) of the Companies (Winding-Up) Rules 1972 were clear, precise and unambiguous. The court therefore had to adopt the ordinary and natural meaning of those

words. In the circumstances, there was a clear breach of r 5(1)(a). MBB's application to amend the order to replace the name of the deputy registrar with the name of the judge appeared to be an acknowledgement that the order as it originally stood breached r 5(1)(a) (see paras 24, 26 & 34).

(2) Rule 5(1)(a) was not a mere technicality or rule of practice but went to the fundamental question of jurisdiction. Compliance with the rule was essential for the court to issue a winding up order. The deputy registrar had no jurisdiction whatsoever to issue the order. The breach of r 5(1)(a) rendered the winding up order null and void for lack of jurisdiction (see para 36).

(3) The jurisdiction of a court to set aside fundamentally irregular or seriously defective orders was inherent and not dependent on any express statutory provision. It could not therefore be argued that s 243 of the Companies Act 1965 (which allowed the court to grant a stay of a winding up order) or any decision that said a winding up order could not be discharged or rescinded after it had been made, had the effect of removing the court's inherent jurisdiction to set aside fundamentally irregular or seriously defective orders (see paras 37–39 & 43).

(4) In general, an application to set aside an irregular order should be made with reasonable promptitude or within a reasonable time, and before the applicant had taken any fresh step after becoming aware of the irregularity. In this case, MBB argued that the application was filed 3 1/2 years after the issuance of the order and that no explanation was given for the delay. It was also submitted that the irregularity did not result in any prejudice as the petition was uncontested and no creditor or contributory appeared at the hearing; that no appeal was lodged against the winding up order; that a liquidator had been appointed and that the respondents had not adduced any evidence to show prima facie that the company was solvent. Although these contentions were not without merit, nevertheless, the deputy registrar's lack of jurisdiction was so fundamental that it was incurable by any order of the court. The defect was of such a serious nature that there was a real need to set aside the order in the interests of justice (see paras 44 & 47–48).

[Bahasa Malaysia summary

Rayuan ini bermula dari keputusan Timbalan Pendaftar Mahkamah Tinggi untuk perintah penggulungan sebuah syarikat ('SKS Foam') atas petisyen Malayan Banking Bhd ('MBB'). Sekitar tiga tahun selepas perintah dibuat, tiga responden pertama di sini ('responden'), yang mendakwa sebagai pencarum dan/atau pemiutang SKS Foam, memohon untuk campur tangan dan mengetepikan perintah penggulungan atas alasan ia adalah kebatalan bagi perlanggaran k 5(1)(a) Kaedah-Kaedah Syarikat (Penggulungan) 1972 yang

menyatakan bahawa hanya seorang hakim di mahkamah terbuka boleh membuat perintah sedemikian. Mahkamah Tinggi menolak permohonan mengetepikan itu tetapi membenarkan MBB meminda perintah penggulungan untuk menunjukkan bahawa ia dibuat oleh hakim dan bukan timbalan pendaftar. Mahkamah Rayuan ('MR') membenarkan rayuan responden dan mengetepikan kedua-dua perintah penggulungan dan perintah meminda memutuskan bahawa kedua-duanya adalah kebatalan. Persoalan kebenaran ke Mahkamah Persekutuan dalam rayuan ini terhadap keputusan MR adalah sama ada Mahkamah Tinggi mempunyai bidang kuasa untuk mengetepikan perintah penggulungan yang telah disempurnakan, walaupun ia telah diperoleh dengan melanggar k 5 Kaedah-Kaedah Syarikat (Penggulungan) 1972.

Diputuskan, menolak rayuan, mengesahkan keputusan MR, menjawab persoalan berhubung kebenaran secara afirmatif dan memerintahkan petisyen penggulungan untuk didengar sebelum hakim Mahkamah Tinggi di mahkamah terbuka:

(1) Perkataan 'Hakim di Mahkamah terbuka' dalam k 5(1) Kaedah-Kaedah Syarikat (Penggulungan) 1972 adalah jelas, tepat dan nyata. Oleh itu, Mahkamah telah menggunakan makna biasa dan semulajadi perkataan tersebut. Dalam keadaan ini, terdapat pelanggaran jelas k 5(1)(a). Permohonan MBB untuk meminda perintah untuk menggantikan nama timbalan pendaftar dengan nama hakim kelihatan sebagai suatu pengakuan bahawa perintah yang pada asalnya dinyatakan melanggar k 5(1)(a) (lihat perenggan 24, 26 & 34).

(2) Kaedah 5(1)(a) bukanlah perkara remeh atau kaedah amalan semata-mata tetapi berbalik kepada soalan asas bidang kuasa. Pematuhan dengan peraturan adalah penting bagi mahkamah untuk mengeluarkan perintah penggulungan. Timbalan pendaftar tidak mempunyai bidang kuasa untuk mengeluarkan perintah itu. Pelanggaran k 5(1)(a) menjadikan perintah penggulungan batal dan tidak sah kerana kekurangan bidang kuasa (lihat perenggan 36).

(3) Bidang kuasa mahkamah untuk mengetepikan perintah yang secara asasnya tidak teratur atau benar-benar cacat adalah wujud dan tidak bergantung kepada mana-mana peruntukan statutori yang nyata. Oleh itu, tidak boleh dikatakan bahawa s 243 Akta Syarikat 1965 (yang membenarkan mahkamah untuk memberikan perintah penggulungan) atau apa-apa keputusan yang mengatakan suatu perintah penggulungan tidak boleh dilepaskan atau dibatalkan selepas ia telah dibuat, mempunyai kesan menghapuskan bidang kuasa mahkamah untuk mengetepikan perintah yang tidak teratur atau benar-benar cacat (lihat perenggan 37–39 & 43).

(4) Secara amnya, suatu permohonan untuk mengetepikan suatu perintah

yang tidak teratur hendaklah dibuat dengan langkah yang munasabah atau dalam masa yang munasabah, dan sebelum pemohon telah mengambil langkah baru setelah menyadari ketidakteraturan itu. Dalam kes ini, MBB berhujah bahawa permohonan itu difailkan 3 1/2 tahun selepas pengeluaran perintah itu dan tidak ada penjelasan yang diberikan untuk kelewatan itu. Ia juga dihujahkan bahawa ketidakteraturan itu tidak menyebabkan apa-apa prejudis kerana petisyen itu tidak dipertikaikan dan tiada pemiutang atau pencarum muncul di perbicaraan itu; bahawa tiada rayuan dibuat terhadap perintah penggulungan; bahawa pelikuidasi telah dilantik dan responden tidak mengemukakan apa-apa keterangan untuk menunjukkan prima facie bahawa syarikat itu adalah berupaya menyelesaikan segala hutang. Walaupun pertikaian ini tidak tanpa merit, namun, kekurangan bidang kuasa timbalan pendaftar sangat penting sehingga tidak dapat disembuhkan oleh sebarang perintah mahkamah. Kecacatan itu adalah sangat serius bahawa terdapat keperluan nyata untuk mengetepikan perintah demi kepentingan keadilan (lihat perenggan 44 & 47–48).]

Notes

For cases on winding up in general, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1336–2146.

Cases referred to

American International Assurance Bhd v Coordinated Services L Design Sdn Bhd [2012] 1 MLJ 369, CA (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd [2014] 6 MLJ 779, FC (refd)

Craig v Kanssen [1943] KB 256, CA (refd)

Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal [1995] 3 MLJ 472, SC (refd)

EU Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37, FC (refd)

Foo Yoke Ling & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35, SC (refd)

Generation Products Sdn Bhd v Majlis Perbandaran Klang [2008] 6 MLJ 325, FC (refd)

Harkness v Bell's Asbestos and Engineering Ltd [1967] 2 QB 729, CA (refd)

Hew Hooi Chun v KL Teksi Radio Bhd [2011] 3 MLJ 754, CA (refd)

Isaacs v Robertson [1985] AC 97, PC (refd)

Krish Maniam & Co v Golden Plus Holdings Berhad [2014] MLJU 1920; [2014] MLRHU 466, HC (refd)

Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd [2010] 4 MLJ 651, CA (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, FC (refd)
PricewaterhouseCoopers v Saad Investments Co Ltd [2014] UKPC 35, PC (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685, FC (refd)
Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1, FC (refd)
Sinarlim Sdn Bhd v Waja Destinasi (M) Sdn Bhd [2011] 5 MLJ 416, CA (refd)
Storti v Nugent & Ors 2001 (3) SA 783 (W) (folld)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)
Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830, CA (refd)
White v Weston [1968] 2 All ER 842, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78
Companies Act 1965 ss 218, 243, 355, 372(d)
Companies Act 61 of 1973 [SA] s 354, 354(1)
Companies (Winding-Up Rules) 1972 rr 5, 5(1)(a), 28, 194
Rules of Court 2012 O 15 r 6(2)(b), O 20 r 11

Lua Ai Siew (Soo Thien Ming & Nashrah) for the appellant.
Yusuf Khan bin Ghows Khan (Fong Teng Fook with him) (Yusuf Khan & Fong) for the first, second and third respondents.
Gopal Sri Ram (Balbir Singh, Sukhwinder Singh, David Yii and Damien Chan with him) (Sukhwinder Singh N Mahinder Singh) for the fourth respondent.
Vasanthi Sathasivam (Sugumaran Kumareson with her) (K Sugu & Assoc) for the intervener.

Alizatul Khair FCJ (delivering judgment of the court):

INTRODUCTION

[1] This judgment is delivered pursuant to s 78 of the CJA 1964 as our sister Zainun bt Ali has since retired. This is a unanimous decision by the remaining members of the panel who heard this appeal.

[2] The appeals before us relate to the first, second and third respondents' application at the Shah Alam High Court to set aside a winding up order dated 18 March 2013 ('the said winding up order').

[3] The sole ground in support of the application to set aside the said winding up order was that it contravened r 5(1)(a) of the Companies (Winding-Up Rules) 1972 ('the Winding-Up Rules'). It was made by the Deputy Registrar of the High Court and not by a judge.

[4] The respondents' application to set aside the said winding up order was dismissed by the Shah Alam High Court on 23 September 2016. On 22 May 2013, the Court of Appeal reversed the decision of the High Court and set aside the said winding up order under its inherent jurisdiction.

[5] On 24 August 2017, this court granted leave to appeal on the following question of law, that is:

> Whether the principle established in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 confers jurisdiction upon a court to set aside a perfected winding up order for breach of r 5 of the Companies (Winding-Up) Rules 1972 having regard to the decision in *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830; [1995] 2 CLJ 392.

[6] For ease of reference we set down below the parties in these two appeals.

[7] The petitioner in the High Court was Malayan Banking Bhd ('Maybank'):

(a) Maybank was the first respondent in the Court of Appeal; and

(b) upon leave being granted by the Federal Court, Maybank filed the notice of appeal dated 4 September 2017 herein which is registered as Appeal No 02(i)-99–09 of 2017(B) ('Appeal 99').

[8] The respondent in the High Court was SKS Foam (M) Sdn Bhd (in liquidation):

(a) SKS Foam (M) Sdn Bhd (in liquidation) was the second respondent in the Court of Appeal; and

(b) upon leave being granted by the Federal Court, SKS Foam (M) Sdn Bhd (in liquidation) filed the notice of appeal dated 6 September 2017 herein which is registered as Appeal No 02(i)-101–09 of 2017(B) ('Appeal 101').

SKS Foam (M) Sdn Bhd applied to intervene in these proceedings. The intervener was granted leave by the Federal Court on 24 August 2017.

[9] The applicants in the High Court are the respondents in this appeal. The appellants in these appeals are Maybank and SKS Foam (M) Sdn Bhd (in liquidation).

A BRIEF FACTS

[10] On 19 December 2012, Maybank presented a petition to wind up SKS Foam (M) Sdn Bhd, the intervener herein based on a judgment debt of approximately RM4m.

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[11] On 18 March 2013, Maybank's solicitor attended the Shah Alam High Court for the hearing of the winding up petition presented against the SKS Foam (M) Sdn Bhd However, as was the practice then the winding up petition was fixed for hearing before the deputy registrar. (It should be stated here and, as observed by the Court of Appeal, such a practice was not supported by any provision of law nor any practice direction). No creditor or contributory appeared at the hearing of the winding up petition on that day. Upon confirmation from the official receiver's representative that the said office had no objections to the petition, the said deputy registrar entered the winding up order against SKS Foam (M) Sdn Bhd.

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[12] More than three years later, on 29 June 2016 the first, second and third respondents ('the respondents') who claimed to be contributories and/or creditors of SKS Foam (M) Sdn Bhd, filed an application pursuant to O 15 r 6(2)(b) of the Rules of Court 2012 and/or the inherent jurisdiction of the court to intervene in the winding up proceedings and to set aside the winding up order. It is not disputed that prior to the abovesaid filing, the respondents did not participate in the winding up proceedings. They did not file a notice of intention to appear in the High Court as required by r 28 of the Companies (Winding-Up Rules) 1972.

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[13] The first, second and third respondents contended that the winding up order is invalid on the ground that the order was purportedly entered by a registrar and not the judge as stipulated in r 5(1)(a) of the Companies (Winding-Up Rules) 1972.

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[14] Maybank on the other hand, took the position that there was a typographical error in the winding up order dated 18 March 3013. It then applied under O 20 r 11 of the Rules of Court 2012 to amend the winding up order. On 18 July 2016, the High Court allowed the application.

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[15] On 23 September 2016, the High Court dismissed the respondents' application to set aside the winding up order. On 22 May 2017, the Court of Appeal allowed the respondents' appeal.

I

DECISION OF THE COURT OF APPEAL

[16] The Court of Appeal held that a winding up order made by a Deputy Registrar of the High Court is null and void and ought to be set aside as it contravenes r 5(1)(a) of the Companies (Winding-Up) Rules 1972. Essentially the Court of Appeal held that:

> [9] ... Based on r 5(1), it is clear to us that the effect of this rule is that a winding up order must be made by a judge in open court. The deputy registrar, in our judgment, was bereft of any power to grant the said winding up order which he did in chambers and thus in contravention of this rule. Consequently, the said winding up order is invalid and void ab initio. The question of amending the said winding up order under the circumstances did not arise, however, since the court below had allowed the application to amend an invalid order coupled with the fact that the appellants had been deprived of the right to be heard on the respondents' application, which in our view is in breach of rules of natural justice, the amending order is consequently rendered null and void as well.

OUR FINDINGS

[17] The question of law posed before us is as follows:

> Whether the principle established in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 confers jurisdiction upon a court to set aside a perfected winding up order for breach of r 5 of the Companies (Winding-Up) Rules 1972 having regard to the decision in *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830; [1995] 2 CLJ 392.

GENERAL PRINCIPLES

[18] It is trite that generally, a court becomes functus officio and has no power to vary an order after it has been drawn up. One High Court cannot set aside a final order made by another High Court of concurrent jurisdiction. An exception to this rule is where an order was irregularly obtained. The inherent jurisdiction of the court to set aside such an order was succinctly expressed in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 36:

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms.

[19] This principle was expounded in the leading case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. In that case, the Federal Court reaffirmed that where the final order of a court is

proved to be null and void on ground of illegality or lack of jurisdiction, the court has an inherent jurisdiction to set it aside ex debito justitiae (per Mohd Azmi FCJ at p 409). The power of the court to set aside orders made in breach of written law is inherent and need not be derived from any statutory provision (per Gopal Sri Ram JCA at p 429):

> It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist.

[20] Noting the courts in England have not closed the door as to the type of defects that render a final judgment liable to be set aside *ex debito justitiae*, Mohd Azmi FCJ explained the nature of the requisite contravention in the important passage below (at p 409):

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', *the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law.* The discretion to invoke the inherent jurisdiction should also be exercised judicially *in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.* In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (Emphasis added.)

[21] This passage was discussed in *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1 at para 35. The court confirmed that the reference to 'exceptional cases' in *Badiaddin* should not be read as a separate category giving the courts a broad power to set aside previous orders. Rather, the phrase relating to 'serious defects' should be read in the context of an order that was obtained in contravention of a statute, such that it is illegal or made outside the jurisdiction of the court.

[22] In the present case, the central issue concerns the effect of the winding up order made by the deputy registrar on 18 March 2013 ('the order'), against the provision in the Companies (Winding-Up) Rules 1972 ('the Winding-Up Rules') which requires winding-up petitions to be heard before a judge in open court. In light of the principles summarised above, the issue in dispute can be analysed in three parts:

(a) was there a breach of the Winding-Up Rules?

(b) if there was a breach, was it the type of serious defect described in *Badiaddin*? and

(c) if the breach was a serious defect for the purposes of *Badiaddin*, can the court set aside the winding up order?

Was there a breach of the Winding-up Rules?

[23] Section 218 of the Companies Act 1965 ('the Act') states the circumstances in which 'the *Court* may order the winding up' of a company, with 'Court' being defined in s 4 as 'the High Court or a judge thereof'. Under s 372(d) of the Act, the Rules Committee is duly empowered to make rules generally with respect to the winding up of companies. Rule 5(1)(a) of the Winding-Up Rules states:

> 5 Matters to be heard in Court and Chambers
>
> (1) The following matters and applications in Court shall be heard before *the Judge in open Court*:
>
> (a) petitions; (Emphasis added.)

[24] The words 'Judge in open Court' are clear, precise, and unambiguous. The court should therefore adopt the ordinary and natural meaning of the words, since it is to be presumed that the draftsman had intended to express the intention of the lawgiver, in this context, the Rules Committee (see *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685 at para 155, *Generation Products Sdn Bhd v Majlis Perbandaran Klang* [2008] 6 MLJ 325 at para 41). In the absence of any suggestion of injustice or absurdity, the court cannot resort to an unduly strained construction (see *Foo Yoke Ling & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35 at para 43). As such, we find no merit in counsel's attempt to read s 218 of the Act or the Winding-Up Rules to empower a deputy registrar to make winding up orders.

[25] The appellants relied on *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 in support of the contention that the High Court judge was acting through the deputy registrar. In that case, the Supreme Court stated 'it is immaterial that the said order of the High Court was actually made by the learned registrar and not a High Court judge. The learned registrar should be considered notionally to be making the order as if he were a deputy High Court judge'. That case can be easily distinguished: on the facts therein, there was no allegation that the registrar had acted in contravention of any express provision.

[26] The concurrent finding of fact by the courts below that the impugned order in this case was made by a deputy registrar and not a High Court judge in open court is undisputed. The name of the deputy registrar as reflected in the

order was not a typographical error. In the circumstances, we are of the view that there was a clear breach of r 5(1)(a) of the Winding-Up Rules.

Was the breach a serious defect for the purposes of Badiaddin?

[27] To recapitulate, the principle elucidated in *Badiaddin* relates to contraventions of 'substantive statutory provisions' so as to render the order void for 'illegality or lack of jurisdiction'. The contravention must be 'of such a serious nature' that the order must be set aside in the interests of justice; it must not relate to mere 'procedural requirements'. This requirement of seriousness is reflected in s 355 of the Act and r 194 of the Winding-Up Rules, which provide that no proceedings shall be invalidated by any formal defect or irregularity, unless the court is of the opinion that substantial injustice has been caused, and that injustice cannot be remedied by any order of the court.

[28] The crucial question is therefore, whether the breach of r 5(1)(a) of the Winding-Up Rules constitutes a 'serious defect' of the nature described so as to render the order a nullity, or whether it is a mere procedural non-compliance. The distinction between the two may be difficult to ascertain with precision as said by Lord Greene MR in *Craig v Kanssen* [1943] KB 256 at p 258:

> ... it is desirable to examine the distinction between proceedings or orders which are nullities and those in respect of which there has been nothing worse than an irregularity. No definition is to be found in the rule which draws a line between these two classes. Exactly where that line lies may not be easy to discover in some circumstances. The existence of the distinction, however, has been recognised in many authorities.

[29] In *White v Weston* [1968] 2 All ER 842, Russell LJ in the English Court of Appeal held at p 846:

> I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as 'irregular' or 'a nullity'. The defect is in my judgment so fundamental as to entitle the defendant as of right, *ex debito justitiae*, to have the judgment avoided and set aside. If as a technical matter it is a matter of discretion to set aside the judgment: '... in accordance with settled practice, the court can exercise its discretion only in one way, namely, by granting the order sought', to quote UpJohn LJ in *Re Pritchard (deceased)* [1963] 1 All ER 873 at p 881, letter D; [1963] Ch 502 at p 521.

[30] In *Isaacs v Robertson* [1985] AC 97, Lord Diplock in the Privy Council distilled from the authorities the proposition that (at p 103):

> ... there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a

discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

[31] The serious nature of a defect that warrants the setting aside of an order ex debito justitiae has been emphasised in a number of cases. The defect must be 'a fundamental vice' (*Craig v Kanssen* at p 265); 'a failure to comply with an essential provision' (*Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 at p 381), 'some impropriety which is considered to be so serious as to render the proceedings a nullity' (*Tuan Haji Ahmed Abdul Rahman* at p 36). The irregularity must be 'a breach of the rules of natural justice contravention of a statute which is a sine qua non'; the order must not be merely irregular in the sense that it was obtained in breach of a rule of court or of practice (*CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd* [2014] 6 MLJ 779 at para 11, quoting with approval *Hew Hooi Chun v KL Teksi Radio Bhd* [2011] 3 MLJ 754).

[32] By way of illustration, the types of irregularities that have been held to fall within this category include where the court or authority had no power to make the order in contravention of written law (*Badiaddin*, *EU Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37), procedural impropriety in depriving parties of the right to be heard (*Tuan Haji Ahmed Abdul Rahman*, uncertainty in the order itself (*Tuan Haji Ahmed Abdul Rahman*), and failure to serve the notice of hearing (*Muniandy*). In those cases, the irregularity rendered the order a nullity and void.

[33] The case of *Krish Maniam & Co v Golden Plus Holdings Berhad* [2014] MLJU 1920; [2014] MLRHU 466 involved a similar fact scenario as the present case. A deputy registrar heard the winding-up petition in chambers and issued a winding up order, in the absence of the judge who was away at a meeting. However, on the face of the order, it appeared that the order was made by the judge in open court. Vernon J allowed the application to set aside the order on the basis that it was made without jurisdiction and in breach of r 5 of the Winding-Up Rules. A contrasting decision was reached in the English Court of Appeal in *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729. In *Harkness*, an order purportedly granting leave to the plaintiff to issue a writ notwithstanding the expiry of the limitation period was issued by the district registrar. It was contended that the order was flawed in that the jurisdiction to give leave is vested in a judge in chambers, not a registrar. Lord Denning MR begin by observing that the relevant rule was new and that the parties' ignorance 'very pardonable' (at p 734):

> The first flaw was that the district registrar had no jurisdiction to give leave at all. The jurisdiction is vested in a judge in chambers in person. That was enacted by a new rule, RSC, Ord 128, r 1(1), which was made in December, 1963, or January, 1964. But in April, 1964, both the solicitor for Mr Harkness and the district registrar were unaware of it. I think their ignorance was very pardonable. The new rule had not been circulated or published in such a way as to come to the notice of practitioners.

In the circumstances of the case, Lord Denning MR went on to hold that the failure was a mere irregularity and not a nullity (at p 735):

> ... it was said that the failure was not merely a failure to comply with the requirements of the rules (which require the application to be made to a judge in chambers in person). There was a failure, it was said, to comply with the statute, because s 2(1) of the [Limitation] Act of 1963 says that the application shall be made to the court: and 'the court,' it is said, means a judge in open court. I do not think this is right. In a section dealing with procedure, *the 'court' includes a judge in chambers: and when it includes a judge in chambers, it includes also a master or district registrar, who are his delegates*. The statute was, therefore, complied with. *The only requirement which was overlooked was the requirement of the rules, namely, RSC, Ord 128, r 1(1), that the jurisdiction was to be exercised by a judge in chambers in person. The failure to comply with that rule is under the new rule to be treated as an irregularity and not as a nullity*. It can be corrected simply by saying that the leave given by the registrar shall be regarded as valid. (Emphasis added.)

[34] However if one were to read the judgment in the context of the factual matrix of the case it is clear that the Court of Appeal in *Harkness* was concerned with the injustice of penalising a litigant for non-compliance with a new rule, which had not been published or circulated and of which the lawyers and the district registrar were unaware. These concerns do not arise in the present case: the Winding-Up Rules have been in place since 1972, and Maybank's application to amend the order to reflect the name of the judge instead of the deputy registrar appears to be an acknowledgment that the order as it originally stood was in breach of the relevant rule.

[35] In addition, r 5(1)(a) of the Winding-Up Rules stipulates that the petition be heard by a 'judge in open court'. Even if one were to adopt the *Harkness* interpretation of 'judge in chambers' to include a registrar (on which we express no opinion), the present case would require the statutory language to be strained even further in order to read 'judge in open court' to extend to a deputy registrar in chambers.

[36] In our view, r 5(1)(a) is not a mere technicality or rule of practice, but it is a rule that goes to the fundamental question of jurisdiction. Compliance with the rule was essential for the court to issue a winding up order. The deputy registrar had no jurisdiction whatsoever to issue the said order. Without attempting to lay down a definitive test to distinguish between technical and

substantive provisions, we consider that in the circumstances of this case, the contravention of r 5(1)(a) falls squarely within the category of contravention of written law in *Badiaddin*, which renders the resulting order null and void for 'lack of jurisdiction'.

Can the court set aside the order?

[37] It was argued that the court had no power to set aside or rescind a perfected winding up order after it has been made. The order, it was asserted, could only be stayed pursuant to s 243 of the Act which provides:

> 243 Power to stay winding up
>
> (1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

[38] In this regard, the appellants rely on the Court of Appeal decision in *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830, wherein NH Chan JCA held (at p 833):

> A winding up order could not be discharged or rescinded after it had been made. The only remedy is to apply for a stay of proceedings under the winding up order: see s 342(1) of the Companies Act 1965.

[39] Section 243 of the Act is silent on the power of the court to set aside an irregularly obtained winding up order made without jurisdiction. It is pertinent at this juncture to reiterate that the jurisdiction of a court to set aside fundamentally irregular or seriously defective orders is inherent and not dependent on any express statutory provision. It is also noted that none of the cases relied upon by the appellants on this point (*Vijayalakshmi*, *Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd* [2010] 4 MLJ 651, *Sinarlim Sdn Bhd v Waja Destinasi (M) Sdn Bhd* [2011] 5 MLJ 416, *American International Assurance Bhd v Coordinated Services L Design Sdn Bhd* [2012] 1 MLJ 369) involved an irregular or defective order made in contravention of written law.

[40] An illumination on the proper scope of s 243 can be gleaned from the South African case of *Storti v Nugent & Ors* 2001 (3) SA 783 (W). Section 354(1) of the Companies Act 61 of 1973 (the South African equivalent of our s 243) likewise finds its origins in the English Companies Act. However, whereas the Malaysian and English equivalent refer only to the power to stay, the South African version specifically provides for the power of the court both to stay and to set aside proceedings. Nevertheless, Gautschi AJ held that the addition of the power to set aside did not alter the scope of the section in any fundamental way from the English position (at pp 794–795):

> ... the section as borrowed from English legislation originally only permitted the staying of proceedings. The power to set aside was introduced in the 1926 Companies Act. The balance of the section remained largely unchanged. Although the word 'stay' means, in our law, to suspend, the expression has a wider meaning in English law. Apart from the usual meaning (suspend), it may also mean the total discontinuance of proceedings ... The addition of the power to set aside has therefore not altered the scope of the section in any fundamental way. (Emphasis added.)

[41] It is pertinent to note that the court held that s 354 of the South African Companies Act did not apply in a situation where the validity of the winding up order is challenged on the basis of some defects. Gautschi AJ held (at p 795):

> A moment's reflection reveals that an application to set aside or stay winding-up proceedings may arise in two broad situations. On the one hand, the winding up order may be attacked on the basis that it should never have been granted, by reason of some defect in the procedure or the merits of the application. On the other hand, the winding up order may be unassailable in itself, but later events may render a stay or setting aside of the winding-up proceedings necessary or desirable.
>
> In my view, the section is intended to cover the latter situation, and not the former.

[42] Gautschi AJ reasoned that in respect of an assailable winding up order, it can be rescinded under the common law without need for recourse to any specific statutory provision. In addition, it is significant that the section refers to 'proceedings' and not 'order':

> Although the expression 'proceedings' may therefore be accepted to be wide enough to include any order granted, generally when an order is set aside, all the proceedings which flowed from the order (for example execution) are automatically set aside as well. The reference to 'proceedings' is therefore another indication that this section was not intended for or geared to the rescission of an assailable order. This is strengthened when 'proceedings' is read with 'stay' and 'set aside'. *The Court has the power to suspend (stay) the proceedings, or to set them aside, in which latter event the entire proceedings, including the application for winding up, would be set aside. Where the winding up order had been incorrectly granted, however, the Court would ordinarily wish merely to rescind (set aside) the order, leaving the application for winding up intact.* (Emphasis added.)

[43] Applying the above reasoning to the present case, we do not consider that s 243 of the Act and the decision in *Vijayalakshmi* have the effect of removing the court's inherent jurisdiction to set aside fundamentally irregular or seriously defective orders.

[44] In general, an application to set aside an irregular order should be made with reasonable promptitude or within a reasonable time, and before the applicant had taken any fresh step after becoming aware of the irregularity (*Tuan Haji Ahmed Abdul Rahman* at p 36). It may be possible to persuade the

court that it is too late to set aside a winding up order even if it was granted without jurisdiction. Lord Neuberger in the Privy Council decision of *PricewaterhouseCoopers v Saad Investments Co Ltd* [2014] UKPC 35 (at para 44), albeit in the context of a stay application expressed the following view:

> In many cases, it may be that a court could be persuaded that it was too late for a winding up to be stayed even if it was plainly granted without jurisdiction. The liquidation will very often have proceeded too far for matters to be satisfactorily capable of being restored or otherwise re-organised, as would be required if there was to be a stay, or third party rights may have been created or varied in such a way as would render it unjust to stay the winding up (or more unjust to stay than not to stay). In the present case, there is no suggestion of the respondents (or anyone else) having done anything irrevocable pursuant to the Bermuda winding up order ...

[45] Nevertheless, lapse of time is not in itself a bar to an application to set aside an irregular order (see *Muniandy* at p 384). Per Edgar Joseph Jr FCJ in *Tuan Haji Ahmed Abdul Rahman* at p 42):

> Nevertheless, it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:
>
> (a) no one has suffered prejudice by reason of the defendant's delay;
>
> (b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or
>
> (c) to let the judgment to stand would constitute oppression.

[46] It has also been suggested that the applicant must establish 'sufficient cause' for setting aside the irregular order under the common law. An inability to establish prima facie solvency may be an obstacle to the relief sought (*Storti v Nugent* at p 808).

[47] The appellants have brought to our attention the long delay of 3 1/2 years between the issuance of the order and the respondents' filing of the application to set the order aside, and the absence of any explanation for the delay from the respondents. It was submitted that the irregularity in this case did not result in any prejudice, given that the winding up petition was uncontested and no creditor or contributory appeared at the hearing thereof. No appeal was lodged against the winding up order. A liquidator had been appointed. Further, the respondents have not adduced any evidence to indicate at a prima facie level the solvency of the company.

[48] We agree that these contentions are not without merit. Nevertheless, we are of the view that the deputy registrar's lack of jurisdiction is so fundamental as to be incurable by any order of the court. The present case constitutes an 'exceptional case' envisaged in *Badiaddin*, where the defect is of such a serious

nature that there is a real need to set the Order aside in the interests of justice.

[49] Accordingly, the question of law is answered in the affirmative. The appeal is dismissed with costs and the decision of the Court of Appeal affirmed. We therefore order that the petition be remitted to the High Court for hearing before a judge in open court.

[50] Finally, we wish to state that our decision today is based solely on the perculiar facts of this case.

Appeal dismissed with costs; Court of Appeal decision affirmed.

Reported by Ashok Kumar